



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102751/2022

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Held in Dundee (by CVP) on 27 July 2022

Employment Judge B Beyzade

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Mrs. G Liebert

**Claimant
In person**

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Edwards Engineering (Perth) Ltd

**Respondent
Represented by:
Mr D. Alexander,
Company Director**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The judgment of the Tribunal is that:

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1.1. the complaint of breach of contract in respect of arrears relating to the claimant's car allowance payable in the month of September 2021 is well founded and the respondent is ordered to pay the claimant the sum of £179.00 (gross) from which tax and national insurance requires to be deducted, provided that the respondent intimates any such deductions in writing to the claimant and remits the sum deducted to Her Majesty's Revenue and Customs.

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1.2. The remainder of the claimant's breach of contract claim is not-well founded and is dismissed.

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REASONS

Introduction

2. The claimant presented a complaint of breach of contract (failure to make car allowance payments to the claimant between April 2021 and September 2021 in lieu of the respondent not providing her with a company vehicle), which the respondent denied.
3. A final hearing was held on 27 July 2022. This was a hearing held by Cloud Video Platform (“CVP”) pursuant to Rule 46 of the Employment Tribunal Rules. I was satisfied that the parties were content to proceed with a CVP hearing, that it was just and equitable in all the circumstances, and that the participants in the hearing were able to see and hear the proceedings.
4. The claimant prepared and filed a Joint Inventory and Bundle of Productions in advance of the hearing consisting of 47 pages. Although the respondent was not sent a copy of the Productions until during the morning of the hearing, having seen the Productions the respondent’s representative did not object to the claimant adducing those documents in evidence. The respondent’s representative declined an opportunity for a brief adjournment to read the documents and he advised that this was not necessary. By consent, I gave permission for the claimant to rely on the Productions consisting of 47-pages.
5. In addition I had before me a copy of the Tribunal file which included the ET1 Form, ET3 Form, the claimant’s ACAS Early Conciliation Certificate, directions of Employment Judge Gall dated 10 June 2022, two emails from the claimant dated 27 June 2022, the respondent’s email of 07 July 2022, and various other email correspondences between the Tribunal and the parties.
6. At the outset of the hearing the parties were advised that the Tribunal would investigate and record the following issues as falling to be determined, both parties being in agreement with these:

6.1 Did this claim arise or was it outstanding when the claimant’s employment ended i.e. on 2 May 2022?

6.2 Did the respondent do the following:

6.2.1 Fail to make a payment to the claimant between April and September 2021 in lieu of not providing her with a company car?

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6.3 Was that a breach of contract?

6.4 How much should the claimant be awarded as damages? The claimant claims the net amount of £250.00 per month which amounts to £1500.00 net or £1988.00 gross across 6 months between April and September 2021.

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7. The claimant gave evidence at the hearing on her own behalf and Mr D. Alexander, Company Director gave evidence on behalf of the respondent.

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8. The claimant made closing submissions, whereas the respondent's representative was not in attendance after the hearing was adjourned for a lunch break at 1.45pm (and reconvened at 2.33pm). Prior to the lunch adjournment, the respondent's representative applied for an adjournment as he had a business meeting at 1.30pm. I refused the application to postpone the hearing. Notice was sent to parties that the final hearing was listed for one day on 10 June 2022 pursuant to the directions of Employment Judge Gall. A Notice of Hearing was sent to the parties thereafter, and no application was made to adjourn the hearing prior to today's hearing. I considered the timing and manner of the respondent's application, and that there was no good reason why the application was not made sooner. I determined that the hearing shall proceed, and both parties would be given an opportunity to make submissions if they wished. However the respondent's representative did not attend when the hearing was reconvened to make submissions on behalf of the respondent.

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Findings in fact

9. On the documents and oral evidence presented the Tribunal makes the following essential findings of fact restricted to those necessary to determine the list of issues –

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Background

10. The claimant was employed by Edwards Engineering (Perth) Limited between 19 April 2021 and 02 May 2022 as a Quality, Health, Safety and Environmental Manager.

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11. The respondent, Edwards Engineering (Perth) Limited, was a private limited company which had its registered offices at Glenearn Road, Perth, PH2 0NJ.

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12. The nature of the respondent's business included manufacture of metal structures and parts of structures.

13. On average the claimant worked 39 hours each week.

14. The claimant's pay before tax was £3958.33.

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Contract of Employment

15. The claimant was provided with a contract of employment by the respondent dated 12 March 2021, which was signed and dated by the claimant on 19 March 2021.

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16. Clause 4 of the contract of employment set out the claimant's salary, salary review provisions, permitted deductions from salary, entitlement to a company vehicle, and an annual discretionary bonus. Clause 4d. stated "*You will be provided with an appropriate company vehicle to enable you to fulfil the role.*"

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Company vehicle

17. As the company vehicle did not arrive by June 2021, the claimant asked her line manager when she will be provided with a vehicle, who seemed surprised this was included in her contract, and he promised to investigate the matter.

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18. As the claimant was not provided with a company vehicle, the claimant had to use her own car as her responsibilities required her regular attendance at sites in relation to different projects across Scotland. Thereafter the claimant advised her line manager that this was getting too much for her as she had travelled many miles in her personal vehicle.

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19. Mr Alexander advised the claimant by email dated 19 October 2021 that there were no automatic vehicles available, and she could either wait until April or take a manual vehicle or he could find her a second-hand vehicle. Although the claimant replied the same day requesting a manual vehicle for the time being and an automatic vehicle in April 2021, thereafter by an email sent on 21 October 2021 the claimant confirmed she will be happy with a manual van.
20. The claimant was advised by Mr Alexander by email dated 20 October 2021 that he was awaiting confirmation on the order for the van which should arrive in March/April. He said the cost was approximately £230.00 per month and he proposed to pay this to the claimant as a car allowance from 1 October 2021 onwards until the car arrived. The claimant sent an email on the same day advising that the amount offered by him was “*nowhere near the ‘reasonable arrangement’*” referred to in their previous conversation.
21. The claimant’s line manager contacted Mr Alexander who proposed during a meeting between himself and the claimant on around 10 November 2021 that a car allowance of £493.00 gross per month (£250.00 net) be paid to the claimant. This payment was to be made to the claimant from September 2021. The claimant accepted this proposal.
22. Accordingly the claimant was paid car allowance payments in November 2021 (£1300.00 gross in relation to September, October, and November 2021), December (£510.00 gross), and from January 2022 until April 2022 (£493.00 gross per month).
23. Between April 2021 and October 2021 the respondent had paid the claimant’s mileage claims in respect of the use of the claimant’s personal vehicle for business purposes (at £0.45 per mile which is the HMRC designated rate for a private car mileage reclaim), and thereafter the respondent stopped making payments in respect of her mileage claims between November 2021 and January 2022. In February 2022 the claimant was partially paid her mileage claim and her mileage claims were fully paid in respect of March and April 2022.

24. The claimant sent an email to Mr Alexander on 10 February 2022 asking him to confirm that her personal vehicle has been added to the company car insurance, the extent of coverage, and that insurance cover will be in place until 10 June 2022. Mr Alexander replied that the company vehicle that is due to arrive will be fully insured by the respondent and that the claimant should insure her personal vehicle. He advised her that she is being paid a car allowance of £250.00 per month net to cover the costs of using her own car.
25. On the same day the claimant advised Mr Alexander that she insured her car to cover 12,000 miles, the mileage was higher than she anticipated, and to change the insurance cover to include business use would cost her an additional £1250.00. She stated that she had a conversation with Mr Alexander about the allowance to cover car depreciation and adding her car to the company's insurance policy, and she queried whether her understanding was correct. Mr Alexander replied the same day advising that he did not recall agreeing to pay for insurance costs in addition to the car allowance and that she is able to claim mileage for business miles. He stated that the £250.00 per month payment is equivalent to around £530.00 costs to the respondent per month (and that the company were paying her tax).
26. As the company vehicle had not been provided to the claimant by February 2022, the claimant requested that the respondent paid a car allowance to cover the period between April 2021 and September 2021. The respondent refused the claimant's request.

Claimant's resignation

27. The claimant resigned from her employment with the respondent on 02 March 2022, and she provided two months' notice.

Events after resignation

28. The claimant was advised by Ms D Bell, Finance Manager on 10 March 2022 that if she travelled from her home to her office she could not claim mileage, whereas if she travelled from home or the office to a site, this could be claimed

as an expense. A copy of the Expenses Policy was provided to the claimant on 28 March 2022 and HMRC's definition of business mileage was sent to her on 24 March 2022.

5 29. The claimant received an email from Mr Alexander on 29 March 2022 advising her that there was an agreement in November 2021 which was backdated by 2 months to generously compensate her for having to use her private vehicle and it was proposed that the respondent would make a goodwill payment of £150.00 to her.

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30. The claimant replied by email dated 31 March 2022 advising that her mileage was questioned after she sent her resignation email and she requested payment of her mileage, £150.00 in addition to this, and payment of her car allowance from April 2021 to September 2021. Mr Alexander advised the claimant by email on 01 April 2022 that the respondent processed a payment of £150.00 plus her other outstanding expenses that morning and that they were not prepared to change the agreement made in November 2021. He pointed out that the claimant received £0.45 for company mileage and £493.00 per month since September 2021.

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31. The claimant worked during her notice period of 2 months. Her notice period ended on 02 May 2022.

32. The claimant contacted ACAS to start Early Conciliation on 13 April 2022 and ACAS issued the Early Conciliation Certificate on 27 April 2022.

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33. The claimant presented her claim to the Tribunal on 15 May 2022 in which she stated, "*I request the company to pay outstanding car allowance of 6 months (April to September) net value £250 for not fulfilling their contract statements.*"

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Observations

34. On the documents and oral evidence presented the Tribunal makes the following essential observations on the evidence restricted to those necessary to determine the list of issues –
35. On the whole I found the claimant to be a credible and reliable witness who gave her evidence in a clear manner. She provided a copy of her contract of employment and her evidence was consistent with this and the email correspondences in the Productions. I observed that there was an error in section 9.2 of the claimant's ET1 Form where she stated she was claiming "Payment of 6 x £250 net value equals about £3000." The claimant had in fact intended to claim for the sum of £1500 net.
36. In terms of the respondent's evidence, there was documentary evidence to support the fact that the respondent agreed to pay the claimant the sum of £250.00 net and £493.00 gross per month in respect of her car allowance from September 2021 onwards. However the amounts recorded on the payslips in 2021 differed from this. In addition the respondent stated in its ET3 Form that the claimant was paid £1500 car allowance in November 2021, whereas the November 2021 payslip recorded that she was paid £1300.00.

Relevant law

37. To those facts, the Tribunal applied the law –

Breach of Contract claim

38. Payment of a car allowance is considered as expenses and not wages and therefore cannot be claimed as "wages" under section 23 of the *Employment Rights Act 1996*. However, a claim can be made for the sum, if unpaid, as damages for breach of contract under the *Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994* ("the Order") where the claim is outstanding on the termination of employment.

39. The presented claim invokes the Tribunal's concurrent contractual jurisdiction conferred, in terms further to section 3 of the *Employment Tribunals Act 1996* and which arises upon termination of a Contract of Employment. They are accordingly claims which fall to be determined in accordance with the principles of the substantive law of contract in the same way as such claims would be determined in the sheriff court or Court of Session.

40. Article 3 of *the Order* provides:

"3 Extension of Jurisdiction

Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—

(a) the claim is one to which (s 3(2) Employment Tribunals Act 1996)

applies and which a court in Scotland would under the law for the time being in force have jurisdiction to hear and determine;

(b) ...

(c) the claim arises or is outstanding on the termination of the employee's employment."

41. The time limit for bringing a claim under Article 7 of the Order is set out as follows:

"Time within which proceedings may be brought

7. An employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented—

(a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim..."

42. The claimant seeks damages in respect of the alleged breach of contract. The measure of damages in contract is a sum of money the payment of which would put the alleged innocent party namely the claimant, in the position that they would have been in but for the breach.

Claimant's submissions

43. The claimant made detailed oral submissions which the Tribunal found to be informative. References are made to essential aspects of the submissions with reference to the issues to be determined in this judgment, although the Tribunal considered the totality of the claimant's submissions and the evidence provided by both parties. As I indicated above, the respondent did not avail itself of the opportunity to make submissions.
44. The claimant submitted that the provision of a company vehicle was part of her contract of employment and that she was not provided with a car allowance during the period of time between April 2021 and September 2021.
45. She confirmed that she was paid £1300.00 gross in November 2021 and that this payment was made in relation to the car allowance payments she was due in respect of September, October, and November 2021. She stated that this was approximately £200.00 less than what she was owed, although she did not query this at the time as she was still working.
46. The claimant confirmed she was claiming £1500.00 net car allowance in total (£250.00 net per month) from April 2021 to September 2021.

Discussion and decision

47. On the basis of the findings made the Tribunal disposes of the issues identified at the outset of the hearing as follows –

Express terms

48. The terms of the Contract of Employment provided that the claimant will be provided with an appropriate company vehicle to enable her to fulfil her role. The terms did not specify any further detail including what vehicle would be issued to the claimant or when this would be delivered to her. It became clear in October 2021 that the claimant was unlikely to receive a company vehicle until March/April 2022. Although there was no mention of this in the claimant's

Contract of Employment, the respondent's policy provided that the claimant could claim business mileage in accordance with its policy at the rate of £0.45 per mile, and indeed, the claimant claimed and received payments in respect of this. However, there was no express contractual provision entitling the claimant to be paid a car allowance in the event that a company vehicle was not provided or not available.

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49. While it would be open to parties to expressly contract for such payments the Contract of Employment, which parties have reduced to writing, does not do so.

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Implied terms

50. Neither is this a circumstance in which because the Contract of Employment is entirely silent on or fails to recognise the existence of a requirement to travel from home or the respondent's office to places of duty and any requirement to pay the claimant a car allowance in respect thereof it is necessary to imply some obligation into the contract of employment in order to give it business efficacy.

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51. The terms of the written contract are clear and unequivocal. There is no such obligation to pay for expenses incurred in travelling from residence or the respondent's office to the place of duty which forms part of the agreement. Even had the wording of the written contract been ambiguous there was no evidence before the Tribunal that went to support the proposition that parties had intended that such an obligation to pay a car allowance formed part of the agreement. The respondent's position was that their intention had not been to include such a provision, nor did they believe that the claimant intended the same or was under any misapprehension in respect of the same, which is why discussions (and indeed negotiations) took place in respect of a car allowance in October/November 2021.

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52. Likewise in clause 3a. of the Contract "Place of Work" it is made clear that the claimant's place of work would be not only in the respondent's office at

Glenearn Road but at various sites where the company operates. The claimant for her part did not assert that she had ever focused the issue of a car allowance in discussions with the respondent when agreeing her salary and other terms of employment. As there was no express term in the Contract of Employment, the claimant would need to rely upon a proposition that such a provision was automatically implied into a contract of employment either by the law or by common practice. She offered no authority or further evidence in support of those contentions.

53. It would be contrary to the conduct of the parties considered as a whole to imply such a term, in particular the fact that the claimant and the respondent agreed to a car allowance being payable to her during a meeting in November 2021 and that such agreement was to take effect from September 2021. Parties having considered it necessary to agree to payment of a car allowance and the terms relating to the same demonstrates that it is not appropriate for the Tribunal to imply a term in the circumstances. The agreement relating to payment of a car allowance from September 2021 was evidenced in the later emails between the claimant and Mr Alexander referred to above.

54. The claimant also submitted that there was an obligation in the contract of employment to supply a company vehicle and the respondent was in breach of this. There was no car allowance provided in the contract in the event that a company vehicle was not available. The claimant is entitled to be placed in the same position she would have been in if there had not been a breach of contract. Whilst the respondent did not provide a company vehicle, the claimant continued to work for the respondent using her personal vehicle and it was accepted by the claimant that she was paid mileage expenses throughout April 2021 and September 2021 at £0.45 per mile. In the absence of an agreement to be paid a car allowance in addition to this, there was no evidence before the Tribunal to show that the claimant was not adequately compensated in respect of the non-provision of a company car to her between April 2021 and September 2021. The claimant did not insist on being paid a car allowance in respect of April 2021 to August 2021 when the discussions

between the parties took place on 10 November 2021 and the agreement for payments to be made from September 2021 was reached.

55. On the evidence presented the claimant has failed to establish that any such
5 obligation for a car allowance to be paid to her was included in the contract
and accordingly has failed to establish any breach of contract in respect of
non-payment to her for expenses spent engaged in travel to and between
places of work from April 2021 to August 2021. The claim in relation to non-
payment of a car allowance to the claimant between April 2021 and August
10 2021 is accordingly dismissed.

56. However, the parties agreed in around November 2021 that the claimant will
be paid the sum of £250 net and £493.00 gross per month starting from
September 2021 by way of a car allowance until she received the company
15 vehicle which was due to arrive in March/April 2022. The claimant's first car
allowance payment was made in November 2021 in the sum of £1300.00
gross. The respondent's ET3 stated in error that the claimant was paid £1500
in November 2021. The claimant should have been paid the sum of £1479.00
gross in respect of September, October, and November 2021 (£493.00 gross
20 per month). The respondent failed to pay the agreed car allowance amount of
£179.00 gross in respect of part of September 2021. This gives a figure of
£179.00 gross which is awarded in respect of damages for breach of contract.

Conclusion

25 57. Except that the claimant is awarded the sum of £179.00 gross in respect of
partial non-payment by the respondent of the claimant's car allowance in
September 2021, the claimant's claim for breach of contract in respect of any
car allowance claimed for the period between April 2021 and August 2021 is
not well founded and it is therefore dismissed.

30 **Employment Judge:** **B Beyzade**
Date of Judgment: **23rd August 2022**
Date sent to parties: **25th August 2022**